



**Gathogo v Republic (Criminal Appeal E018 of 2022)  
[2024] KEHC 14680 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14680 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E018 OF 2022  
RM MWONGO, J  
NOVEMBER 19, 2024**

**BETWEEN**

**DANIEL GITAU GATHOGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both conviction and sentence of thirty (30) years imprisonment in CM'S Court Kerugoya S.O Case No. 11 of 2019 by Hon. G.W. Kirugumi (PM) delivered on 23rd August, 2022)*

**JUDGMENT**

1. The appellant was charged in the lower court with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the sexual offences Act No.3 of 2006. He also faced a second count of engaging in an Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act.
2. The particulars of the charge were that on the 2<sup>nd</sup> November, 2019 at Kirinyaga County intentionally and unlawfully caused his penis to come into contact with the vagina of J.N, a girl aged three and half years. The Appellant pleaded not guilty to the charge and consequently the Respondent called four witnesses. At conclusion of the trial, the trial court convicted the Appellant for defilement and sentenced him to 30 years' imprisonment.
3. Dissatisfied with the verdict of the trial court, the Appellant lodged the instant appeal, on the following grounds:
  1. That, the learned trial court erred in law and fact to convict me without considering that there was a dispute between I and the mother of the complainant.
  2. That, the learned trial magistrate erred in both matters of law and fact to base my conviction on contradiction and uncorroborated prosecution evidence.



3. That, the learned trial magistrate erred in both matters of law and fact which failed to consider that the element of the offence was not proved beyond reasonable doubts.
  4. That, the trial magistrate erred in both law and fact to shift the burden of proof to the accused person and reject my defense without a cogent reason to do.
4. This being a first appeal this court is required to review all the evidence on record and evaluate with a view to making its own conclusions keeping in mind that the court had not itself heard the witnesses or assess their demeanour. In *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424.”

### **The Prosecution Case**

5. PW1- JN testified that she was 4 years old and went to school at Shalom. She stated that she was at home when Gitau inserted his finger inside her vagina. The witness pointed out where the said Gitau inserted his finger. In addition, she claimed that he used his “dudu” to touch her vagina. The minor further stated that she experienced pain and she informed her grandmother. The child identified Gitau as the accused in the dock and informed the Court that she was living with him. The child was subjected to cross examination and stated that the accused did bad things to her, at her vagina, which she pointed at.
6. PW2 Hezron Macharia is a registered Clinical Officer, informed the Court that he treated the complainant on 4<sup>th</sup> November 2019. The patient was assigned reference number 39288 of 2019. The minor informed him that she had been sexually assaulted severally by a person known to her. The last episode was on 2<sup>nd</sup> November, 2019 at 5 pm. He observed that the child was traumatized and her hymen was broken, although it was not freshly broken. He observed a yellowish/whitish discharge from the vagina. The witness produced the P3 form as PExhibit 1.
7. PW3 Lincoln Mwangi, a Medical Officer stated that he examined the minor at Kerugoya County referral hospital on 4<sup>th</sup> November, 2019. She informed him that her step-father defiled her on 2<sup>nd</sup> November, 2019. He testified that the child’s hymen was torn, but not freshly torn. He also observed a yellowish/whitish discharge from the vagina. The witness produced the Post Rape Care Form as PExhibit 2 and the treatment notes as exhibit 3.
8. PW4 Margret Nyaguthie testified that the minor’s grandmother was bathing the child, when she complained that Gitau had been inserting fingers into her vagina. The grandmother requested the witness to examine the child and verify the claim. The witness observed that the child’s private parts were swollen and that she had a discharge. The child also informed the witness that the accused had been sexually assaulting her with his fingers. She was among those who escorted the minor to hospital where the doctor confirmed the assault.



9. PW5 PC Milka Ndungu, an investigating officer took up the matter from the initial investigating officer, PC Julia, who died before the case was concluded. The witness testified that the grandmother made a report at the station. The minor was 3 ½ years. The accused was the step-father. The witness produced a birth notification for the minor who was born on 29<sup>th</sup> November, 2015 as PExhibit 4.

### **Defence Case**

10. The Accused was placed on his defence and gave a statement under oath He claimed that he never committed the offence since he was never alone with the child. He claimed that the mother would pick her from school and take her to her grandmother's home and later bring her home. The accused claimed that he lived with the child and her mother as his wife. He stated that no one witnessed the alleged defilement incident. The grandmother was told about it by the child. According to him, there was sufficient evidence to prove the offence. The minor's clothes had been washed. Further, he was not examined by a doctor.

### **Appellant's submissions**

11. In his submissions the appellant raised issues on four prongs:

#### **Dispute between the mother and the complainant**

12. The appellant submits that he did not commit and has never thought of doing such inhumane acts which could destroy a minor's life. He says it is his wife who framed this case and coached the complainant (PW1) to lie before the court so that when he was sentenced, she has a high chance of controlling all his assets. He has never thought or dreamt of such evil acts.

#### **Contradictions and inconsistencies**

13. It was submitted that prosecution case was riddled with material doubts and contradictions which were not proved to the required standard in law. He referred to *Woolmington v D.P.P. (1935) AC.462* a Landmark House of Lord's Case, where it was stated:

“If there is any reasonable doubt created by the evidence brought forward by the prosecution is not proved and the case is entitled to acquittal.”

#### **Offence was not proved beyond reasonable doubt**

14. The appellant submits that since the offence committed is very serious and required detailed investigations, the court ought to carefully analyze the evidence adduced. He states that the evidence on record did not reach the required standard of the law, which is inconsistent with section 163(i) of the *Evidence Act*. Further that the prosecution case is riddled with prejudice and malice which were clearly demonstrated before this honorable court. A first appellate court has a duty to carefully examine and analyze afresh the evidence presented from the lower court and draw its own conclusions

#### **Defence was not considered**

15. The appellant submits that the trial court failed to consider his defence without any cogent reason. The prosecution's evidence lacked credibility, was inconsistent and contradictory and could not sustain the heavy burden of proof beyond reasonable doubt placed on the prosecution.



## **Respondent's submissions**

16. The respondent stated that the Appellant withdrew his appeal vide a notice filed on 24<sup>th</sup> October, 2023 and thus his only contention relates to the legality of sentence meted by the trial court.
17. On sentencing the respondent submitted that it is a discretion of the trial court and that the Superior Court can only interfere with the sentence if it is established that the trial magistrate considered irrelevant material facts, overlooked certain factors or if the sentence is said to be excessive or harsh in the circumstances. Reliance was placed on *Wanyema v Republic* (1971) E.A 494).
18. Further it is worth noting that before the pronouncement by the Supreme Court in *Republic v Joshua Gichuki Mwangi* in Supreme Court Petition No. E018/2023 the law relating to mandatory sentences had been outlawed. In this regard, the Respondent submits that the trial court rightly applied the law when it relied on the case of *Francis Matonda Ogeto v Republic* 2019 eKLR, and sentenced the Appellant to 30 years imprisonment, thus departing from the prescribed mandatory sentence in the statutory law.
19. It was submitted that that the maximum sentence provided by law for the offence herein is life imprisonment that the appellant was a first offender, who did not appear remorseful in his mitigation despite having been found guilty of committing a barbaric act. In this context, the sentence of 30 years was lawful and not excessive.

## **Issues for Determination**

20. Whether the appeal has merit.

## **Analysis and Determination**

21. In a case for defilement what has to be proved are the ingredients of the offence. This was pointed out in *George Opondo Olunga v Republic* [2016] eKLR, where it was stated that the ingredients of the offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.
22. Section 8 (1) of The *Sexual Offences Act* provides that:

“ 8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

## **Whether the penetration was proved**

23. The appellant submits that when the complainant was examined by the doctor, she was not found with any injuries on her body or genitalia, and no penetration was exhibited against him.
24. PW1 the child, testified that the accused was well known to her as she was living with him. She identified him by name and physically pointed at him. She stated that he penetrated her using his fingers and penis. PW2 observed that the child was traumatized and her hymen was broken. He noted that it was not freshly broken. He observed a yellowish/whitish discharge from the vagina. The witness produced the P3 form as PExhibit 1. PW 3 testified that the child's hymen was torn and it was not freshly torn.



He also observed a yellowish/whitish discharge from the vagina. The witness produced the post rape care form as exhibit 2 and the treatment notes as exhibit 3. PW4 physically examined the child and confirmed that her private parts were swollen and that she had active discharge.

25. Section 2 of the Sexual Offence Act defines “penetration” as follows:

“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

As for “Indecent Act” the same is defined in Section 2 to include:

“(h) any contact between any part of the body of a person with the genital organs, breasts or buttock of another but does not include an act that causes penetration.”

“Sexual Assault” is defined at Section 2 as follows:

“(i) any person who unlawfully

- a. Penetrates the genital organs of another person with
- b. Any part of the body of another or that person.”

26. It is clear that penetration of the complainant’s vagina was proved by the fingers of the appellant; and otherwise by way of indecent act by touching the child’s genitals.

### **Age of the victim**

27. The age of the victim is not in dispute. PW5, the investigating officer, produced the birth notification for the minor who was born on 29<sup>th</sup> November, 2015, and was aged 3 ½ years at the material time.

### **Identification or recognition of the offender**

28. It is for the prosecution to prove beyond reasonable doubt that the accused did an act that caused penetration and at that time the victim was a minor. PW1, the child testified that the accused was well known to her as she was living with him. She identified him by name as Gitau, and physically pointed at him. She stated that he penetrated her using his fingers and touched her with his penis. The child was subjected to cross examination and stated that the accused did bad things to her, pointing at her vagina.

29. None of the witnesses testified that they saw appellant defiling the complainant. The appellant thus claimed that he never committed the offence since he was never alone with the child. He claimed that the mother would pick her from school and take her to her grandmother’s home and later bring her home. The accused claimed that he lived with the child and her mother as his wife. He stated that no one witnessed the alleged defilement incident. Further, the appellant pointed out that PW5- the investigating officer did not produce any evidence to prove that the appellant defiled the complainant. Further, the appellant stated he did not undergo any medical examination to ascertain traces of the complainant’s DNA on him.

30. Section 124 of the *Evidence Act* states;

“Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim



and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

In the present case there was evidence of two medical personnel who testified that the child’s hymen had been broken sometime in the past. The child’s evidence did not indicate that the sexual assault was fresh, but that she had been assaulted. PW4 confirmed that the child told her the accused had “been inserting his fingers”.

31. The appellant in his defence stated that he worked as a mechanic at Kagumo town. He would leave the house at 8 am and return at 7 pm. He worked for 7 days in a week and rarely interacted with the complainant. However, the complainant’s evidence was clear. The Appellant was identified as Gitau by the complainant. She asserted that Gitau, slept at one end of the bed her mother in the middle and the complainant at the other end when he “did things to her.”
32. In my view the appellant was properly identified. However, the evidence of penile penetration is lacking. There is only evidence of penile “touching” and penetration with the fingers. The evidence of Indecent Act under section II (1) of the Sexual Offence Act. The sentence is imprisonment for a term of not less than ten (10) years.

#### **Whether the sentence meted was manifestly excessive**

33. In light of the foregoing, it is my view that the alternative charge was proved beyond reasonable doubt, whilst the charge of defilement - particularly the element of penile penetration was not proved beyond reasonable doubt.
34. Accordingly, the appeal succeeds in part and the sentence of imprisonment of 30 years for defilement is hereby set aside and substituted with a sentence of fifteen (15) years for indecent act. The sentence to take into account any period the accused spent in pre-trial custody.
35. Orders accordingly.

**DATED AT KERUGOYA THIS 19<sup>TH</sup> DAY OF NOVEMBER 2024**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

Appellant - Present at Nyeri Maximum

State Counsel - Mamba

Murage, Court Assistant

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